IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 12, 2009 Session

DONNA LYNN LUND v. JOHN FREDRIK LUND

Appeal from the General Sessions Court for Loudon County
No. 9792 William H. Russell, Judge

No. E2008-00415-COA-R3-CV - Filed March 19, 2009

Donna Lynn Lund ("Wife") and John Fredrik Lund ("Husband") were married for almost twenty-three years when Wife filed a complaint for divorce. Following a trial, the Trial Court declared the parties divorced, distributed the marital property, and awarded Wife alimony *in futuro*. When dividing the marital property, the Trial Court determined that the pre-marital value of Husband's annuity and pension benefits with his employer were his separate property, but that the increase in value of that separate property was marital property. Husband appeals claiming the increase in value of his annuity and pension should be considered his separate property. We find that because the increase in value of Husband's annuity was entirely market driven, Wife did not substantially contribute to its appreciation and, therefore, the increase in value is Husband's separate property. As to the pension which is based on Husband's years of service, we modify the award and apply the deferred distribution method set forth by the Supreme Court in *Cohen v. Cohen*, 937 S.W.2d 823 (Tenn. 1996). As modified, the judgment of the Trial Court is affirmed and remanded with instructions.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the General Sessions Court Affirmed as Modified; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., and JOHN W. MCCLARTY, JJ., joined.

Donald Capparella, Nashville, Tennessee, and Kimberlee A. Waterhouse, Lenoir City, Tennessee, for the Appellant, John Fredrik Lund.

Donna Lynn Lund, pro se Appellee.

OPINION

Background

The parties were married on April 16, 1983. They have two children, both now adults. In March of 2006, Wife filed a complaint for divorce alleging that Husband was guilty of inappropriate marital conduct or, in the alternative, that irreconcilable differences had arisen between the parties. Husband filed a counterclaim alleging that it was Wife who was guilty of inappropriate marital conduct. The parties eventually were able to stipulate that grounds for divorce existed, but were unable to agree on how to divide all of the marital property or whether Wife was entitled to alimony. Following a trial, the Trial Court entered a document titled "Findings and Orders of the Court." This document provides, in relevant part, as follows:

> The parties, having entered a stipulation of grounds to divorce, have requested the Court to make a determination of the status of the parties' personal and real property which has not already been divided and agreed to.
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> The Court noted that their marriage is of long duration. The parties were married in April of 1983 and divorced in 2007. A period of some twenty plus years.
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> During the time of the marriage the Husband worked for Tennessee Valley Authority. The Wife, in the main, and by agreement was the homemaker and educator of the children.
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> 1). The Court finds that the Parties have a home and ten acres which is marital property. The property is to be placed in the hands of a real estate broker for the purpose of selling it. If the Husband wishes to purchase the Wife's equity and keep the house; he may do so by paying to wife $115,000.00 within 45 days of the final order. . . . He shall hold her harmless from the existing indebtedness on real estate.
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> 2). TVA account # 945507 as separate property of husband.
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> 3). TVA account # 65136136 as separate property of husband.
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> 4). Account #s 2826101, 171775955, 171775283 and 171973208 as separate property of wife.
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> 5). TVA Annuity. The amount the Husband had in this account as of the date of the marriage shall be husband's separate property. All amounts thereafter shall be marital property and divided equally to the parties as to the value on the date of the

> divorce. This is in accordance with T.C.A. 36-4-121(g)(1) and current case law . . . in that the Court finds that each party substantially contributed to the preservation and appreciation.
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> 6). TVA 401K. The amount the Husband contributed by the date of marriage shall be separate property. The balance shall be divided equally as marital property for the same reasons as stated in #5.
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> 7). TVA PENSION. Husband has paid in certain amounts of pension prior to the marriage. Those amounts shall be his separate property. Any increase or amount paid or accrued during the marriage shall be marital property and wife is entitled to an equal share as of the divorce date. This includes any amount which may be due and owing for sick leave or vacation.
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> 8). TVA IRAs in husband's name. This property is deemed to be marital property and shall be divided equally as to its value on the day of the divorce.
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> 9). TVA IRAs in wife's name. This property is deemed to be separate property and shall be to wife. . . .

The Trial Court also ordered Husband to pay Wife alimony *in futuro* in the amount of $1,100 per month.

The Trial Court thereafter entered a Final Judgment of Divorce. In pertinent part, the final judgment provides as follows:

> That pursuant to the stipulation of the parties and pursuant to Tenn. Code Ann. § 36-4-129, the parties are hereby granted a divorce from one another on stipulated grounds and the Court hereby pronounces the parties divorced.
>
> The Court finds that the parties have a home and ten acres which is marital property. The property is to be placed in the hands of a real estate broker for the purpose of selling it. If the Husband wishes to purchase the Wife's equity and keep the house, he may do so by paying to the Wife $115,000.00 within 45 days of the final order. . . .
>
> TVA Annuities. The Court orders that the amount the Husband had in said account at the time of the marriage, and the

> parties agreeing that it was $41,377.24[1], shall be awarded to the Husband as his separate property. All amounts thereafter shall be marital property and divided equally between the parties as of the value of the date of the divorce and shall be divided pursuant to a Domestic Relations Order or such other documents or vehicle that may be necessary to be utilized for the division of said account.
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> TVA 401(k) Account. The Court hereby directs that the first $5,200.00 would be awarded to the Husband as his separate property and that the balance of said account as of the date of the divorce shall be divided equally between the parties.
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> TVA Pension. The Husband has a pension with TVA and shall be divided with the Wife receiving 47.9% of said pension and the Husband receiving 52.1% of said pension, this taking into consideration the premarital value of the account paid into prior to the marriage. This shall include any amount which may be due and owing on the sick leave or annual leave. . . . (paragraph numbering omitted; footnote added)

Each party was ordered to pay their own attorney fees and the court costs were divided equally between the parties.

Husband appeals raising two issues which are directed at the Trial Court's division of his annuity and pension benefits with TVA. These two issues, taken verbatim from Husband's brief, are as follows:

> 1. Whether the evidence preponderates against the trial court's finding that 100% of the appreciation of [Husband's] separate property interest in his TVA annuity fund was marital property where (1) [Husband] worked for nearly 13 years at TVA contributing to his annuity fund prior to the marriage, (2) the appreciation of his TVA annuity fund and pension benefits were driven solely by interest rates provided by TVA, and (3) [Wife] did not substantially contribute to the preservation and appreciation of the fund?
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> 2. Whether the evidence preponderates against the trial court's division of Mr. Lund's monthly pension benefits as 47.9% to [Wife] and 52.1% to [Husband] where (1) [Husband] worked for nearly 13 years at TVA accruing his pension benefits prior to his marriage, (2) the trial court's holding [is inconsistent with] Cohen v. Cohen, 937

[1] We are unsure how the Trial Court arrived at this amount. The actual figure that the parties agreed was in this account at the time of the marriage was $26,161.16.

S.W.2d 823 (Tenn. 1996), which requires distribution based upon years of service divided by the years of the marriage from the division of pension benefits?

Wife, proceeding pro se, raises no separate issues, but does request that we affirm the judgment of the Trial Court.

Discussion

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

Husband began working at TVA on June 29, 1970. Almost thirteen years later, the parties were married on April 16, 1983. The parties were both working at TVA when they met. Once they started a family, Wife worked at home and home-schooled the children.

At the time of the marriage, Husband had two different annuity funds with TVA. Husband had a fixed interest annuity fund valued at $11,697.05, and a variable investment annuity fund valued at $14,464.10. These two annuity funds later were combined in 1986.

Leroy Bible ("Bible"), a certified public accountant, was called as an expert witness by Husband. Bible testified that at the time of marriage, the combined value for both of Husband's TVA annuities was $26,161.15. On the day the trial began on June 29, 2007, the value of those annuities (which, as stated, had been combined in 1986) was $453,331,78. Utilizing the interest rates provided by TVA, Bible testified that to a reasonable degree of certainty, the present value of the premarital amount of the annuity was $258,842.74. Bible arrived at this figure by "[t]aking the approximate $26,000 original balance pre-marriage and adding to it the earnings attributed to it during that 23 year period." In arriving at this figure, Bible did not include any of the contributions that were made during the marriage or any interest/earnings on those marital contributions. According to Bible, the portion of the annuity that was contributed during the marriage, plus the interest that it earned, was valued at $194,489.04 as of the date of trial.

Husband also has a pension with TVA. As of June 11, 2007, Husband's pension benefits upon retirement were valued at $4,068.00 per month, with an estimated supplemental benefit of $477.08. As with most pensions, the monthly benefit amount will increase the longer Husband works for TVA. By the time of trial, Husband had worked for TVA for a total of 444 months. Of those 444 months, Husband and Wife were married for 290 months. The remaining 154 months were earned prior to the marriage.

As mentioned previously, the two issues on appeal surround the Trial Court's determination that the increase in value of the pre-marital amount contained in Husband's annuity

and pension should be considered marital property subject to equitable distribution. We were recently confronted with similar facts in *Pedine v. Pedine*, No. E2008-00571-COA-R3-CV, 2009 WL 585943 (Tenn. Ct. App. March 9, 2009).[2] According to *Pedine*:

> Husband's attorney acknowledged that as of the date of trial, Husband's 401k was worth $1,008,000.00 . . . . Of the total value of the 401k, Wife's counsel acknowledged that $65,813.67 which Husband had in his 401k prior to the marriage "would be a separate asset. I don't think there's any question about that." The primary issue with regard to the 401k is whether any increase in value to the $65,813.67 is marital property as found by the Trial Court, or whether the increase is Husband's separate property.
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> Kevin Lusk, a certified public accountant, was called as an expert witness on behalf of Husband. Mr. Lusk testified that since 1990, funds in a 401k could be expected to have grow at a rate of 10% per annum. Nevertheless, assuming that Husband's separate $65,813.67 grew at a rate of only 5%, Lusk concluded that the value of that separate property at the time of the divorce would be $157,347.00. Wife presented no proof to the contrary.
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> In *Langschmidt v. Langschmidt*, 81 S.W.3d 741 (Tenn. 2002), the Tennessee Supreme Court noted that "marital property" includes "any increase in value during the marriage of . . . separate property . . . if each party substantially contributed to its preservation and appreciation and the value of vested pension, retirement or other fringe benefit rights accrued during the period of the marriage." *Id.* at 745 (quoting Tenn. Code Ann. § 36-4-121(b)(1)(B)). In addition, "separate property" includes "appreciation of property owned by a spouse before marriage" except when that property is properly characterized as marital property. *Id.* (quoting Tenn. Code Ann. § 36-4-121(b)(2)(C)). The Court further explained:
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> > As we stated in *Harrison* [*v. Harrison*, 912 S.W.2d 124 (Tenn. 1995)], the appreciation of Husband's separate property during the marriage may be classified as [marital] property only if Wife substantially contributed to its preservation *and* appreciation. 912 S.W.2d at 127. Although it is clear in this case that Wife contributed to the marriage as a homemaker, there is no evidence that she substantially

[2] The time to file a Tenn. R. App. P. 11 application for permission to appeal to the Tennessee Supreme Court in the *Pedine* case has not yet expired.

> contributed to the preservation and appreciation of Husband's non-IRA accounts. To the contrary, it is evident that appreciation in the value of these assets was entirely market-driven. Further, although it is certainly clear that Tennessee courts recognize a homemaker's contribution when making a determination of marital property, see Tenn. [Code Ann.] § 36-4-121(b)(1)(C); *Gragg v. Gragg*, 12 S.W.3d 412, 415 (Tenn. 2000), in the spirit of *Harrison*, we require that some link between the marital efforts of a spouse and the appreciation of the separate property must be established before the separate property's appreciation is considered marital property.

Langschmidt, 81 S.W.3d at 746 (emphasis in the original). How to characterize retirement accounts that accrue during the marriage is much simpler to answer as such benefits "clearly are marital property under Tennessee law." *Id.* at 749 (citing Tenn. Code Ann. § 36-4-121(b)(1)(B); *Gragg v. Gragg*, 12 S.W.3d 412 (Tenn. 2000); *Cohen v. Cohen*, 937 S.W.2d 823 (Tenn. 1996)).

Returning to the present case, while Wife no doubt fulfilled her role of homemaker, there is absolutely no evidence that she contributed in any way to the appreciation of Husband's separate 401k property. Any increase in value was purely market-driven. In addition, the proof at trial preponderates in favor of a finding that 5% per annum would be a reasonable appreciation of the original $65,813.67. Accordingly, we agree with Husband that $157,347.00 should be deducted from the overall value of the 401k and that this amount is Husband's separate property. In summary, as to the 401k, we find that the overall value of that asset is $1,008,000.00, and of that total, $157,347.00 is Husband's separate property, with the remaining $850,653.00 being marital property.

As mentioned previously, Husband also has a pension with his employer. The value of this pension is based on years of service. Counsel for Husband acknowledged at trial that the plan was valued at $214,497 on the day of trial. Because we know the exact value of the pension as of the trial date, it is much easier to determine the amount that is separate property since "[o]nly the portion of the retirement benefits accrued during the marriage are marital property subject to equitable division." *Cohen v. Cohen*, 937 S.W.2d 823, 830 (Tenn. 1996). As of the trial date, Husband had been employed with the same employer for thirty-two years. Fifteen of those years were

> prior to the marriage at issue, and seventeen years of service were earned while the parties were married for the second time. Accordingly, 47% of the $214,497, or $100,813.59, is Husband's separate property, and the remaining 53%, or $113,683.41, is properly characterized as marital property.

Pedine, 2009 WL 585943, at *5-6.

We first will discuss Husband's TVA annuity. The proof at trial established that Husband had a total of $26,161.15 in these annuity accounts at the beginning of the marriage. These accounts were later combined. The evidence presented at trial showed that based on the interest rates provided by TVA, the $26,161.15 had grown to $258,842.74 as of the date of trial. There is no evidence that Wife contributed to the appreciation of this asset. The appreciation was driven solely by the interest rate.

In the present case, as in *Pedine*, "while Wife no doubt fulfilled her role of homemaker, there is absolutely no evidence that she contributed in any way to the appreciation of Husband's separate [annuity]. Any increase in value was purely market-driven." *Pedine*, 2009 WL 585943, at *6. We agree with Husband that the Trial Court incorrectly determined the amount of Husband's separate property contained in the annuity. The judgment of the Trial Court is modified to reflect that of the $453,331.78 contained in Husband's annuity at the time of trial, $258,842.74 is Husband's separate property, and the remaining $194,489.04 is marital property subject to equitable distribution.

Next we will consider Husband's pension. In *Cohen v. Cohen*, 937 S.W.2d 823 (Tenn. 1996), our Supreme Court explained the deferred distribution method of dividing uncertain retirement benefits as follows:

> In other circumstances in which the vesting or maturation is uncertain or in which the retirement benefit is the parties' greatest or only economic asset, courts have used the "deferred distribution" or "retained jurisdiction" method to distribute unvested retirement benefits. This method has distinct advantages when the risk of forfeiture is great. *Kendrick v. Kendrick*, 902 S.W.2d at 927. Under such an approach, it is unnecessary to determine the present value of the retirement benefit. Rather, the court may determine the formula for dividing the monthly benefit at the time of the decree, but delay the actual distribution until the benefits become payable. *In re Marriage of Brown*, 126 Cal. Rptr. at 639, 544 P.2d at 567; *In re Marriage of Gallo*, 752 P.2d at 55; *Deering v. Deering*, 437 A.2d at 891; *Janssen v. Janssen*, 331 N.W.2d at 753. The marital property interest is often expressed as a fraction or a percentage of the employee spouse's monthly benefit. The percentage may be derived by dividing the number of months of the marriage during which the benefits accrued by the total number of months during which the

> retirement benefits accumulate before being paid. *Kendrick v. Kendrick*, 902 S.W.2d at 927 n. 17.[3]
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> One advantage to the deferred distribution method is that it allows an equitable division without requiring present payment for a benefit not yet realized and potentially never obtained. *In re Marriage of Gallo*, 752 P.2d at 55. Another advantage to the approach is that it equally apportions any risk of forfeiture. While a disadvantage may be that the approach requires a trial court to retain jurisdiction to oversee the payment, the entry of an order awarding a certain percentage of the benefits at the time of payment should lessen the administrative burden of the court. Courts routinely retain jurisdiction to supervise payments of alimony and child support and have, in the past, successfully divided vested pension rights by awarding each spouse a share. An administrative burden should not excuse an inequitable distribution of marital property.

Cohen, 937 S.W.2d at 831 (footnote in the original).

We conclude that the "deferred distribution" method is the appropriate way to distribute this asset. On April 2, 2012, Husband will turn 65 years of age. At that time, he will have worked for his employer for 41 years and 9 months, or a total of 501 months. Of those 501 months, the parties were married for 290 months. Accordingly, 57.9% of the total benefits, if Husband retires from TVA at age 65, will be marital property, and the remaining 42.1% will be Husband's separate property. This is so even though the amount of monthly benefits will be higher when Husband reaches age 65 than they were on the date of trial. If Husband should retire from TVA at an age other than 65, the formula for calculating the percentage of marital property remains the same, but the total number of months Husband will have worked for TVA will be different based upon his actual date of retirement.

In summary, we conclude that of the $453,331.78 contained in Husband's annuity, $258,842.74 is Husband's separate property, and the remaining $194,489.04 is marital property subject to equitable distribution. With regard to Husband's pension which is based on years of service, and assuming Husband continues to work for TVA until age 65, at that time 57.9% of the total benefits will be marital property and the remaining 42.1% will be Husband's separate property.

Tenn. Code Ann. § 36-4-121(c) (2005) sets forth various factors to be considered by a trial court when making an equitable distribution of marital property. One of those factors is the "value of separate property of each party." Tenn. Code Ann. § 36-4-121(c)(6). When the Trial

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[3] For example, if retirement benefits had accrued during ten years of a twelve year marriage, and if the benefit payments would be payable at the end of twenty years, the ratio would be 120/240. Fifty percent of the potential benefit would be marital property. The trial court would then make an equitable division of that fifty percent allotting a portion to the nonemployee spouse.

Court incorrectly determined that Wife substantially contributed to the appreciation in the pre-marital value of Husband's annuity and pension, it also concluded that an equal distribution of marital assets was equitable. Because the value of Husband's separate property is more and the value of the marital property is less than originally determined by the Trial Court, it is appropriate to remand this case for the Trial Court to consider whether, due to the amount of Husband's increased separate property, it would be equitable for Wife to receive greater than 50% of the marital property. This should not be interpreted as a requirement that the Trial Court award Wife more than 50% of the marital property, and we express no opinion on this issue. Rather, the Trial Court is to reconsider what is equitable in light of this opinion.[4] The Trial Court must determine the appropriate percentage to award each party with regard to the marital property contained in both the annuity and the pension, keeping in mind that the exact monetary value of the pension cannot be determined until Husband actually retires.

Conclusion

The judgment of the Trial Court is affirmed as modified and this cause is remanded to the Trial Court for further proceedings consistent with this opinion and for collection of the costs below. Costs on appeal are taxed to the Appellee, Donna Lynn Lund, for which execution may issue if necessary.

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D. MICHAEL SWINEY, JUDGE

[4] On remand, the Trial Court also is instructed to assign a dollar value to each item of property awarded to each of the parties, including both marital and separate property. In the event of a further appeal, we must be able to ascertain the amount of property awarded to each party so that we can evaluate whether the property distribution is equitable. Simply awarding one of the parties an account without setting forth the value of that account is insufficient for this purpose.